

DOCKET NO. NNH-CV21-6112546-S	:	SUPERIOR COURT
	:	
CITY OF NEW HAVEN,	:	JUDICIAL DISTRICT
	:	
v.	:	OF NEW HAVEN AT NEW HAVEN
	:	
NOSAL BUILDERS, INC.	:	JULY 2, 2021

ANSWER, SPECIAL DEFENSES AND COUNTERCLAIMS

Defendant, Nosal Builders, Inc. (“Nosal”), by and through its undersigned attorneys, McElroy, Deutsch, Mulvaney & Carpenter, LLP, hereby responds to the Complaint of the City of New Haven dated February 22, 2021 as follows:

COUNT ONE: BREACH OF CONTRACT

1. Admit.
2. Admit.
3. Nosal lacks sufficient knowledge to admit or deny the allegations of this paragraph and leaves the plaintiff to its proof.
4. Admit that the construction plans and specifications were prepared by Langan. Nosal lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph and leaves the plaintiff to its proof.
5. Admit that the City and Nosal entered into a written contract on or about May 12, 2016 regarding the subject project. The written terms of the contract speak for themselves. To the extent that the allegations of this paragraph conflict with the written terms of the contract they are denied.
6. Admit that Nosal provided a performance bond issued by NAS as Surety. The written terms of the performance bond speak for themselves. To the extent that the allegations of this paragraph conflict with the written terms of the performance bond they are denied.

7. Admit that the schedule provided with the bid documents reflected a substantial completion date of September 17, 2017. Admit that construction of the Project was substantially completed by September 4, 2018 and the close out of the Project continues to be delayed as asserted in Nosal's Counterclaim.

8. Admit that the Boathouse Design is comprised of written plans and specifications. The written terms of the plans and specifications speak for themselves. To the extent that the allegations of this paragraph conflict with the written terms of the plans and specifications they are denied.

9. Admit that the topping slab was installed on diverse dates October from 2017 through May 2018. Admit that the topping slab was part of the scope of work defined in the written contract between the City and Nosal. The remaining allegations of this paragraph are denied.

10. The written terms of the contract speak for themselves. To the extent that the allegations of this paragraph conflict with the written terms of the contract they are denied.

11. The written terms of the contract speak for themselves. To the extent that the allegations of this paragraph conflict with the written terms of the contract they are denied.

12. Deny.

13. Deny.

14. Deny.

15. Deny.

16. Admit that the topping slab has cracked, debonded and deteriorated in some locations. All remaining allegations of this paragraph are denied.

17. Nosal lacks sufficient knowledge to admit or deny the allegations of this

paragraph and leaves the plaintiff to its proof.

18. Deny.

19. Admit that Nosal denies responsibility for the defects asserted in the Complaint.

All remaining allegations of this paragraph are denied.

20. Deny that Nosal is in breach of contract. Nosal lacks sufficient knowledge to admit or deny the remaining allegations of this paragraph and leaves the plaintiff to its proof.

COUNT TWO: NEGLIGENCE

1 - 20. Nosal incorporates its answers to Paragraphs 1-20 of Count One as its answers to Paragraphs 1-20 of Count Two.

21. Admit.

22. The allegations of this paragraph and all subparts are denied.

23. Deny.

COUNT THREE: INDEMNIFICATION

1 - 23. Nosal incorporates its answers to Paragraphs 1-23 of Count Two as its answers to Paragraphs 1-23 of Count Three.

24. The written terms of the contract speak for themselves. To the extent that the allegations of this paragraph conflict with the written terms of the contract they are denied.

25. Nosal lacks sufficient knowledge to admit or deny the allegations of this paragraph and leaves the plaintiff to its proof.

25[sic]. Deny.

SPECIAL DEFENSES (AS TO ALL COUNTS)

First Special Defense

The statute of limitations bars the City's claims against Nosal.

Second Special Defense

The City has waived and/or released its claims against Nosal.

Third Special Defense

The City is barred by the doctrine of laches.

Fourth Special Defense

The City's alleged damages were caused by persons or entities for whose conduct Nosal is neither responsible nor liable.

Fifth Special Defense

The City's claims are barred, in whole or in part, because the City has failed to mitigate its damages, which includes failing to perform timely maintenance and repair work on the topping slab as recommended by its representatives and consultants.

Sixth Special Defense

The City's claims are barred in whole or in part to the extent that the terms of the Contract are void and/or not enforceable.

Seventh Special Defense

The City's damages, if any, were caused by a superseding intervening act which was beyond the knowledge or control of Nosal.

COUNTERCLAIM

FIRST COUNT (Breach of Contract)

1. Nosal is a corporation incorporated under the laws of the State of Connecticut, with offices in Cheshire, Connecticut.
2. The defendant, New Haven, is a body politic and corporate organized and existing under the laws of the State of Connecticut. The principal offices of New Haven are located at

200 Orange Street, New Haven, Connecticut.

3. On or about May 12, 2016, Nosal entered a Contract (the “Contract”), including incorporated contract documents, with New Haven whereby Nosal agreed to provide labor, material and services in the construction of the Project known at The Boathouse at Canal Dock Phase 2, City Project # 15-175-02, State Project #'S 92-570 & 92-674 and Federal FAP #1092 (131) # H044(003)(the “Boathouse Project”).

4. The Contract incorporates the Connecticut Department of Transportation Standard Specification (Form 816) (“CDOT Specifications”), as supplemented.

5. New Haven retained AECOM as the “Engineer” for the Boathouse Project, as that term is defined in the Contract.

6. On or before September 4, 2018, Nosal substantially completed the construction of the Project in accordance with the Contract as modified by change orders.

7. New Haven has had full and beneficial control and occupancy of the Boathouse Project since September 4, 2018.

8. The City’s designated representative, AECOM, certified to the City that Nosal had substantially completed the construction of the Boathouse Project, including the topping slab, in accordance with the Contract.

9. On or before June 25, 2019, Nosal had completed all work on the Boathouse Project, including all punch list work within their responsibility, and had completed all obligations required for Final Payment under the Contract.

10. On or before June 25, 2019, AECOM, as the Engineer for the City of New Haven, had notified New Haven and Nosal that the Boathouse Project was ready for Final Inspection, as defined under the Contract.

11. Pursuant to the Contract, final payment is due to Nosal following Final Inspection and acceptance by the City.

12. But for the negligent and/or intentional delay by New Haven, the Final Inspection would have been conducted on or before June 25, 2019.

13. On or about April 11, 2019, Nosal submitted its Pay Application #28 for the contract balance in the amount of \$61,420.01.

14. Due to negligent and/or intentional delay by New Haven, Nosal has not received payment for Pay Application #28.

15. New Haven has wrongfully withheld payment of the contract balance to Nosal.

16. New Haven has failed and refused to perform its obligations necessary to close out the Contract despite the recommendations of its Engineer, AECOM, and representatives of the Connecticut Department of Transportation.

17. Due to New Haven's negligent and/or intentional delays in closing out the Boathouse Project, Nosal has been damaged by incurring ongoing costs and expense including surety bonds which would be released following the completion of the Project.

18. Due to New Haven's refusal to release Nosal's payment and performance surety bond for the Boathouse Project, Nosal's ability to take on new work requiring payment and performance surety bonds was impacted.

19. Pursuant to Section 1.11.04 of the CDOT Specifications, in the event of delays caused by New Haven in the completion of the Boathouse Project, Nosal is entitled to recover six percent (6%) of the original total Contract amount divided by the original number of days of Contract time for each day of project delay.

20. On diverse dates including July 8, 2019, July 25, 2019 and June 2, 2020, Nosal

provided written notice to New Haven of its claim for delay damages pursuant to section 1.11.04 of the CDOT Specifications. The value of Nosal's delay claim is accruing at \$2,517.78 per day. On June 1, 2021, the delay claim value was \$1,780,070.46.

21. Despite receiving and acknowledging receipt of notice of Nosal's claim on multiple occasions, New Haven has failed and refused to respond or assert any substantive or technical defense to the delay claim.

22. Due to New Haven's breach of the Contract, including the negligent and/or intentional delay in performing its obligations to close out the Contract, Nosal has incurred and continues to incur substantial damages which include but are not limited to:

- a. Nonpayment of the undisputed contract balance of \$61,420;
- b. Contractual delay damages as provided by the terms of the Contract totaling \$1,780,070.46 as of June 1, 2021 and which accrues at a per diem rate of \$2,517.78 thereafter;
- c. Damages arising from New Haven's refusal to release Nosal's surety bond obligations on the Project;
- d. Costs; and
- e. Interest.

23. Despite Nosal's demands for payment, New Haven has not paid the amounts owed to Nosal pursuant to the Contract.

24. New Haven has expressly waived all alternate dispute resolution, as may arise under the terms of the Contract, of the issues presented in this action.

25. Nosal has been damaged by New Haven's conduct described above.

SECOND COUNT (Unjust Enrichment)

1. Nosal is a corporation incorporated under the laws of the State of Connecticut, with offices in Cheshire, Connecticut.

2. The defendant, New Haven, is a body politic and corporate organized and existing under the laws of the State of Connecticut. The principal offices of New Haven are located at 200 Orange Street, New Haven, Connecticut.

3. Nosal provided labor, material and services in the construction of the Project known at The Boathouse at Canal Dock Phase 2 (“Boathouse Project”).

4. New Haven has had full and beneficial control and occupancy of the Boathouse Project since September 4, 2018.

5. On or before June 25, 2019, Nosal completed all work on the Boathouse Project.

6. New Haven was benefited by the labor, materials and services provided by Nosal on the Project.

7. New Haven has not fully paid Nosal for that benefit.

8. New Haven’s failure to pay Nosal was to Nosal’s detriment.

9. Justice requires compensation be given to Nosal for the labor, materials and services it provided to New Haven.

PRAYER FOR RELIEF

WHEREFORE, Nosal prays that this Honorable Court award it the following relief:

1. Compensatory damages;
2. Costs;
3. Contractual Interest;
4. Legal Interest; and
5. Such other relief deemed just and equitable by the Court.

DEFENDANT
NOSAL BUILDERS, INC.

By: /s/ Gary F. Sheldon #409809

Gary F. Sheldon
Douglas M. Poulin
McElroy, Deutsch, Mulvaney & Carpenter, LLP
Its Attorneys
One State Street, 14th Floor
Hartford, CT 06103-3102
Tel. 860.522.5175
Fax: 860.522-2796
Juris No. 101812
gsheldon@mdmc-law.com
dpoulin@mdmc-law.com

CERTIFICATION

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on July 2, 2021 to all counsel and self-represented parties of record and that the written consent for electronic delivery was received from all counsel and self-represented parties of record who were or will immediately be electronically served.

Counsel for Plaintiff:

Deborah Monteith Neubert
Neubert, Pepe & Monteith, P.C.
195 Church Street, 13th Floor
New Haven, CT 06510
dmonteith@npmlaw.com

Counsel for Defendant:

Mark A. Milano
Milano & Wanat
471 East Main Street
Branford, CT 06405
mmilano@mwllc.us

/s/ Gary F. Sheldon #409809

Gary F. Sheldon